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In The

Supreme Court of the United States

October Term, 1987

Missouri Highway and Transportation Commission; Robert N. Hunter, Chief Engineer of the Missouri Highway and Transportation Commission and V.B. Unsell, District Engineer for District 8 of the Missouri Highway and Transportation Commission,

Petitioners,

v.

Jane Catlett, Patricia Leembruggen, Grace Tuter and Adeline Kallemyn, Individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICI CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION, THE STATE OF WISCONSIN, AND THE STATE OF WYOMING

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BRIEF AMICI CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION, THE STATE OF WISCONSIN, AND THE STATE OF WYOMING

Mountain States Legal Foundation (MSLF or the Foundation) respectfully submits this brief amici curiae on behalf of its members, the State of Wisconsin, and the State of Wyoming.[1]

[1] MSLF has obtained the oral consent of the parties. The written consent of the parties shall be filed with the Clerk of the Court immediately upon its receipt by amici.

INTEREST OF AMICI CURIAE

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation's members include public and private employers, many of which have affirmative action plans. MSLF has an extensive background and expertise in civil rights litigation.[2]

The Foundation, the State of Wisconsin, and the State of Wyoming are deeply concerned about the possibility of expanded civil rights liability for public and private employers alike. The Eighth Circuit Court of Appeals' decision creates a rule of decision which authorizes the use of general population statistics to state a claim for intentional discrimination, contrary to the prior opinions of this Court. MSLF, the State of Wisconsin, and the State of Wyoming urge this Court to resolve this question by reaffirming its past decisions.

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[2] MSLF was counsel of record in both *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *Johnson v. Transportation Agency, Santa Clara County*, — U.S. —, 107 S. Ct. 1442, 94 L.Ed.2d 615 (1987). In addition, The Foundation has participated as counsel or amicus in many cases defining the scope and application of the Civil Rights Acts and the Fourteenth Amendment. *E.g., Marsh v. Board of Education*, 581 F. Supp. 614 (E.D. Mich. 1984), *aff'd*, 762 F.2d 1009 (6th Cir. 1985), *vacated and remanded*, — U.S. —, 106 S. Ct. 2240, 90 L.Ed.2d 688 (1986); *NAACP v. City of Detroit*, 591 F. Supp. 1194 (E.D. Mich. 1984), *reversed and remanded*, 821 F.2d 328 (6th Cir. 1987); *AFSCME v. State of Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985), *reh'g denied*, 813 F.2d 1034 (9th Cir. 1987).

STATEMENT OF THE CASE

Amici curiae adopt Petitioners' statement of the case in their petition for writ of certiorari.

SUMMARY OF ARGUMENT

In this case, the Foundation seeks to prevent this nation's civil rights laws from requiring all employers to ensure that their work forces "mirror the general population." Under the Eighth Circuit Court of Appeals' decision, a cause of action based upon a pattern and practice of discrimination in violation of Title VII of the Civil Rights Act may be stated by a combination of raw population statistics and other factors, such as anecdotal instances of alleged discrimination. The Court of Appeals' decision equates, for all practical purposes, the relevant labor market with general population statistics. Moreover, the decision ignores the limitations that this Court has previously placed on the use of work force statistics to infer discrimination.

For twenty years, the consistent rule has been that in a pattern and practice of discrimination case, work force statistics must be based upon the relevant labor market, not the general population. By expanding the definition of "relevant labor market," the Eighth Circuit has interjected uncertainty into this area of the law. Employers, public and private alike, are entitled to know whether their personnel practices are likely to subject them to liability under Title VII, and not have the scope of that liability subject to change. The adverse effects

will be pervasive and profound, affecting employment decisions made throughout this country for many years to come.

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REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION UNDERSCORES THE EXISTENCE OF A DISPARITY AMONG THE DECISIONS OF THE CIRCUITS

Recent decisions of the Seventh, Eighth, and Ninth Circuit Courts of Appeals have used conflicting definitions of the relevant labor market, when determining whether statistical disparities in an employer's work justify inferring intentional discrimination. The Eighth and Ninth Circuits have equated the relevant labor market with the general population.[3] This approach fails to account for any special job requirements which would narrow the appropriate labor market. In contrast, the Seventh Circuit adheres to this Court's long-standing precedent that a labor market is rarely the mirror image of the general population.[4]

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[3] *Catlett v. Missouri Highway and Transportation Commission*, 828 F.2d 1260, 1266 (8th Cir. 1987) (Pet. App. 1a), and *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987).

[4] The decision in *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034 (7th Cir. 1987), was issued very shortly before the Petitioners filed their brief, and therefore Amici Curiae will discuss it at greater length in this brief.

A. The "Relevant Labor Market" Consists of Those Persons Who Are Actually Willing and Able to Do the Work

The use of work force statistics to prove intentional discrimination has been limited to comparisons with the actual labor market, as opposed to those persons in the general population theoretically qualified for the job. The Court of Appeals held that the combination of anecdotal incidents of alleged discrimination, coupled with a statistical imbalance in a predominantly male occupation, was sufficient to find discrimination in a class action under Title VII of the Civil Rights Act, 42 U.S.C. secs. 2000e-2000e-2. *Catlett v. Missouri Highway and Transportation Commission*, 828 F.2d 1260, 1266 (8th Cir. 1987) (Pet. App. 1a). However, this approach conflicts with the recent decision in *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034 (7th Cir. 1987), and is inconsistent with both the majority of the Courts of Appeals, as well as this Court's own decisions.

"Title VII imposes no requirement that a work force mirror the general population." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). In *Hazelwood School District v. United States*, 433 U.S. 299 (1977) this Court rejected the use of general population statistics: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.* at 308 n.13.

It is indisputable that the sporadic acts of discrimination alleged could not support the Respondents' "pattern and practice" discrimination charges. "Proving iso-

lated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case of discrimination; rather it must be established by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875-876 (1984).

The use of statistics to infer intentional discrimination against a class has always been subject to careful scrutiny. This Court has recognized that statistics can be manipulated and will not necessarily reveal otherwise demonstrable innocent explanations of discrepancies. An important limit on the use of work force statistics is the specific delineation of the relevant labor market. The Eighth Circuit decision removes the protection against possible abuses by adopting the general population of women as its relevant labor market. Had the Court of Appeals employed the correct labor market definition, it could not have found the Petitioners liable for discrimination.

In this case, the District Court "conservatively" estimated that as of 1980 the relevant labor pool was 37% female. Pet. App. 26a, 31a. This "conservative definition" included all working women between the ages of eighteen and seventy having a driver's license and an eighth grade education. Only managerial, technical, professional and clerical workers were excluded. Pet. App. at 30a-31a.

This labor pool is too broad, because it failed to consider only those individuals willing and able to do the work in question. As this Court stated in *Johnson v.*

Transportation Agency, Santa Clara County, — U.S. —, 107 S. Ct. 1442, 94 L.Ed.2d 615 (1987):

> If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers . . . "regardless of circumstances such as economic conditions or the number of qualified minority applicants."

107 S. Ct. at 1454, *quoting, Local 28, Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*, 478 U.S. 421 (1986) (O'Connor, J., concurring in part, dissenting in part).

Nor is it evident that economic considerations referred to in *Johnson*, were taken into account.[5] Even given an ability to do the work, quite a large number of women, particularly those who have established experience in other types of work, would never accept the reduction in salary and prestige associated with this *entry level* position. In *Equal Employment Opportunity Commission v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988), the court recognized that women were not as interested as men in certain types of duties, hours, and compensation schemes. 628 F. Supp. at 1305-1312.

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[5] In the determination of the relevant labor pool, both the District Court and the Eighth Circuit failed to fully consider the requirements for the maintenanceman position at issue in this case. Among other things, the position requires "mowing the right-of-way, plowing snow off the roads in winter, filling potholes, maintaining buildings and rest areas, and performing minor maintenance tasks on equipment." Pet. App. at 29a. The fact that many otherwise willing women under the age of seventy would not be physically able to fill potholes, or work effectively in the temperature extremes routinely experienced in highway work was never considered.

B. The Seventh Circuit Court of Appeals Has Correctly Articulated the Definition of a Relevant Labor Market

The Seventh Circuit Court of Appeals in *Janowiak* held that an affirmative action plan violates the Fourteenth Amendment and Title VII, if it is based solely upon a disparity between the percentage of minorities in the city's population and the percentage hired by the police and fire departments. The Seventh Circuit followed the correct rule that the relevant labor market for purposes of Title VII is not the same as the general population. "If a job category requires that applicants possess minimum qualifications, the City's proffered statistical comparison must narrow its focus to those actually qualified for the position." 836 F.2d at 1040.

In contrast, the Ninth Circuit in *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), upheld an affirmative action plan that used general population statistics coupled with a pay and promotion survey.[6] The *Janowiak* court attempted to distinguish *Higgins* as holding that "in [*Higgins*] the *Johnson* manifest imbalance standard was satisfied, even though none of the FEPC's statistical comparisons took into account the relevant *qualified* area labor pool for firefighters or firefighters/engineers." 836 F.2d

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[6] The California Fair Employment Practices Commission (FEPC) had investigated the City's employment practices in 1973, and found that minority composition of the workforce was 40% of that of the general population. In addition, the survey suggested that blacks were paid considerably less than whites, and that historically blacks had been hired and promoted in fewer numbers than whites. *Higgins v. City of Vallejo*, 823 F.2d 351, 356 (9th Cir. 1987).

at 1038-1039. Despite the Seventh Circuit's distinctions, the holding in *Higgins* is inconsistent with this Court's prior decisions.

The Eighth Circuit decision in *Catlett* represents an entirely different interpretation of the rule in *Johnson*. In *Catlett*, the court authorizes the use of general population statistics with other, less tangible factors to state a cause of action. This marks a departure from previous pattern and practice decisions. More importantly, there is little guidance for employers, or the judiciary. Instead, statistical disparities between the general population and a given employer's work force imposes strict liability on even good faith affirmative action plans.

Such a result ignores the fact that inferences from statistics should be used with great care, and particular scrutiny should be used in determining the relevant labor market. The same definition of a relevant labor market must be applicable to all similar circumstances. The relevant labor market for teachers, for example, should reflect those persons who are willing and able to teach, rather than a rudimentary demographic profile coupled with other considerations.

II. THE DISPOSITION OF THIS CASE WILL HAVE A WIDESPREAD AND PROFOUND IMPACT UPON FEDERAL, STATE AND LOCAL GOVERNMENTS, AS WELL AS PRIVATE BUSINESSES THROUGHOUT THE UNITED STATES

The Eighth Circuit's reasoning creates an indeterminate "sliding scale," which permits a comparison of the employer's work force to general population statistics in certain, unspecified circumstances to infer intentional dis-

crimination. Employers having a good faith belief that their hiring practices are in compliance with the law will face the continuing prospect of *post hoc* liability. Most employers would look to specific relevant labor markets in analyzing possible liability under Title VII, and the need to adopt affirmative action plans. By expanding that labor market to be essentially equivalent to the general population, the Eighth Circuit requires an employer's work force to "mirror the general population." *International Brotherhood of Teamsters*, 431 U.S. at 339 n.20 (1977). This contradicts the precedent of this Court and the intent of Congress in enacting Title VII.

In addition, if the federal courts routinely use numerous other "factors" such as anecdotal evidence, to validate the use of population statistics, the stability and integrity of the enforcement of Title VII of the Civil Rights Act will be very much in question. Without a general, universally applicable rule, both the public and private sectors will face substantial difficulties in creating and implementing voluntary affirmative action plans, which have traditionally been based on specifically delineated labor markets. According to one survey, at least 192 state and local governmental entities have affirmative action plans.[7] This number does not include the thousands of private employers nationwide which have either voluntarily implemented such plans, nor other employers who

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[7] The "Report of the Minority Business Development Legal Defense and Education Fund on Minority Business Enterprise Programs of State and Local Governments," available from the Academy for State and Local Government, 444 N. Capitol Street, N.W., Suite 349, Washington, D.C. 20001.

have not adopted plans on the basis of a good faith belief that no such plan was warranted.

It is, quite simply, impractical to create rules that require judicial intervention whenever a work force does not mirror the general population. Such a result will only increase litigation and will not advance the goal of ending discrimination.

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CONCLUSION

There is a clear and immediate need for this Court to resolve the inconsistency among the decisions of the Courts of Appeals, and to reaffirm the limits on the use of relevant labor market statistics in inferring a pattern and practice of discrimination in civil rights litigation. The standard advocated by the Eighth Circuit replaces the stability and predictability of prior decisions of this Court with chaos. The Court should grant the Certiorari Petition and remedy the confusion that exists.

> [N]o man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to

introduce in its stead universal distrust and distress.[8]

Dated this 6th day of April, 1988.

Respectfully submitted,

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[8] *The Federalist, No. 78* (A. Hamilton).